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No. 90-403

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1990

JOSEPHINE A. ANDES,

Petitioner,

v.

THEODORE R. KNOX,

Respondent.

Petition For Writ Of Certiorari To The
United States Court Of Appeals For The
Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1.

DID THE COURTS BELOW PROPERLY CONCLUDE THAT THE CAUSE OF ACTION ACCRUED AT THE TIME PETITIONER DISCOVERED THE EXISTENCE OF THE WIRETAP, REGARDLESS OF PETITIONER'S KNOWLEDGE OR LACK OF KNOWLEDGE OF RESPONDENT'S INVOLVEMENT IN SAID ALLEGEDLY ILLEGAL WIRETAP, THEREBY BARRING HER ACTION UNDER 18 U.S.C. § 2520, PURSUANT TO THE APPLICABLE STATUTE OF LIMITATIONS?

2.

CAN ARGUMENTS AND THEORIES RAISED BY PETITIONER THAT WERE NOT BEFORE THE DISTRICT COURT BE CONSIDERED FOR THE FIRST TIME ON APPEAL?

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STATUTES INVOLVED IN CASE

18 U.S.C. § 2511(1)

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who –

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when –

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2520(a)

§ 2520. Recovery of civil damages authorized

(a) In general. – Except as provided in section 2511(a)(ii), any person whose wire, oral, or

electronic communication is intercepted, disclosed, or intentionally used *in violation of this chapter* may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(Emphasis added).

(Remaining portions of § 2520 set forth in the Petition.)

47 U.S.C. § 415(b)

§ 415. Limitation of actions

(b) All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section.

Mo. Ann. Stat. § 516.140 (Vernon Supp. 1989)

§ 516.140. What actions within two years

Within two years: An action for libel, slander, assault, battery, false imprisonment, criminal conversation, malicious prosecution, or actions brought under section 290.140, RSMo. An action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, and for the recovery of any amount under and by virtue of the provisions of the Fair Labor Standards Act of 1983 and amendments thereto, such act being an act of Congress, shall be brought within two years after the cause accrued.

Cal. Civ. Proc. Code § 340(3) (West 1982)

§ 340. [Personal injury; Wrongful death; Torts; Statutory penalties; Check payment by bank; Property seizure; Good faith improvements]

Within one year:

(3) An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Section 4826 of the Business and Professions Code, for such a person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding such animal or fowl or in the course of the practice of veterinary medicine on such animal or fowl.

Md. Ann. Code § 5-105 (1957)

§ 5-105. Assault, battery, libel, or slander.

An action for assault, battery, libel, or slander shall be filed within one year from the date it accrues.

COUNTERSTATEMENT OF THE CASE

Petitioner filed her action to recover damages under 18 U.S.C. § 2520 on November 22, 1988. In that complaint, Plaintiff alleged that between April, 1984 and December, 1984, Respondent, Theodore R. Knox, among others,

intercepted, disclosed, or intentionally used the home telephone conversations of Petitioner (formerly Josephine Frick), without the knowledge or consent of Petitioner, in violation of Chapter 19 of 18 U.S.C. Petitioner also alleged that she did not have a reasonable opportunity to discover either the violation or the fact that her rights under 18 U.S.C. § 2520(1)(a) had been violated until December 29, 1987, when Leslie Albin pleaded guilty to a criminal violation of 18 U.S.C. § 2511(1)(a). Petitioner admitted since the filing of her complaint that she discovered the alleged illegal wiretap on or about December 7, 1984.

Respondent filed an answer to the complaint. Respondent then filed a Motion for Judgment on the Pleadings and suggestions in support thereof, asserting that Petitioner's cause of action under 18 U.S.C. § 2520 was barred by the applicable statute of limitations. (Appendix at p. 1). The exhibits attached to the suggestions in support of the motion indicate that Petitioner discovered the wiretap on her residence telephone as early as December 10, 1984. (Appendix at pp. 27-58). These exhibits also indicate Petitioner knew that Petitioner's husband (John Frick) conducted or directed the wiretap activities, and that she was aware of a potential cause of action against him under 18 U.S.C. § 2520.

In her Suggestions in Opposition to Defendant's Motion for Judgment on the Pleadings, Petitioner argued that she was only aware that her husband or his representatives were responsible for the wiretap, but she did not know who those representatives were. (Appendix at pp. 4-11). Petitioner argued that it was only after Leslie Albin entered a plea of guilty to a criminal wiretap violation on

December 26, 1987, did she became aware of Respondent's involvement. Petitioner also argued that she had no reasonable opportunity to discover the identity of Knox prior to the entry of Albin's guilty plea. Petitioner raised no other arguments and theories in opposition to Knox's Motion for Judgment on the Pleadings at the district court level. The district court treated the Motion for Judgment on the Pleadings as one for summary judgment. The district court found that there was no potential for a cognizable issue of fact as to when Petitioner discovered the violation of § 2520. (Petitioner's Appendix at pp. 15-16). Therefore, the court determined her suit was barred by the applicable statute of limitations.

On June 23, 1989, Petitioner timely filed her notice of appeal. The United States Court of Appeals for the Eighth Circuit found that under § 2520, the cause of action accrues when the claimant has reasonable opportunity to discover the violation, not when she discovers the true identity of the violator or all the violators. Thus, Petitioner's cause of action accrued on December 7, 1984.

Petitioner raised new arguments to oppose the granting of the Motion for Judgment on the Pleadings. Her new arguments were: (1) the district court should not have applied § 2520(e) retroactively; and (2) Knox's identity was fraudulently concealed until December, 1987 and, therefore, statute of limitations tolled until Albin plead guilty. The Eighth Circuit affirmed the district court's Memorandum and Order holding that the cause of action accrued when Petitioner has a reasonable opportunity to discover the violation and not when she discovers the true identity of the violator or all the violators. The Eighth Circuit found that the statute of limitations

period began to run in 1984 because Petitioner was aware of the cause of action against Frick at that time. The Eighth Circuit refused to consider Petitioner's new arguments because they were not raised before the district court. The Eighth Circuit filed its decision on May 31, 1990. Petitioner's Motion for Rehearing En Banc was denied on July 11, 1990.

SUMMARY OF ARGUMENT

The district court properly concluded that there was no cognizable issue of fact as to when Petitioner discovered a violation of 18 U.S.C. § 2520 and therefore, her claim was barred by the applicable statute of limitations. Before the district court, Petitioner argued that a question of fact prevented the statute of limitations from running because, although Petitioner discovered the existence of the wiretap on or about December 7, 1984, she did not have any reasonable opportunity to discover Knox's involvement in the wiretapping, until Mr. Albin pled guilty on December 29, 1987. However, as the case law indicates, her cause of action under 18 U.S.C. § 2520 accrued when she discovered or, by the exercise of due diligence, could have discovered the existence of the wiretap. Therefore, the cause of action accrued on or about December 7, 1984. Under Missouri law, the simple lack of knowledge of the identity of all possible defendants does not toll the statute of limitations as to those unknown defendants. Additionally, applying Petitioner's own test for when a cause of action accrues, her claim under 18 U.S.C. § 2520 accrued in December, 1984, or, at the latest by, March, 1985.

Petitioner fails to mention to this court that on appeal to the Eighth Circuit, Petitioner raised new arguments and theories to support her contention that her complaint raised under 18 U.S.C. § 2520 is not barred by the applicable statute of limitations. These arguments were that the district court applied 18 U.S.C. § 2520(e) retroactively and that Respondent's identity was fraudulently concealed until December 29, 1987. The general rule that a reviewing court shall consider a case only on the argument and theory upon which it was tried below was followed by the Eighth Circuit. This is not a case of plain error as Petitioner contends, nor is it a decision that conflicts with other United States courts of appeals that have discussed the issue of when the statute of limitations begins for purposes of 18 U.S.C. § 2520. Respondent respectfully suggests that this Court should also follow this general rule, and because it is clear that Petitioner's cause of action accrued on or about December 7, 1984, her Petition for Writ of Certiorari should be denied.

1.

DID THE COURTS BELOW PROPERLY CONCLUDE THAT THE CAUSE OF ACTION ACCRUED AT THE TIME PETITIONER DISCOVERED THE EXISTENCE OF THE WIRETAP, REGARDLESS OF PETITIONER'S KNOWLEDGE OR LACK OF KNOWLEDGE OF RESPONDENT'S INVOLVEMENT IN SAID ALLEGEDLY ILLEGAL WIRETAP, THEREBY BARRING HER ACTION UNDER 18 U.S.C. § 2520, PURSUANT TO THE APPLICABLE STATUTE OF LIMITATIONS?

The burden of proof on a claim that a party's cause of action is barred by the statute of limitations is on the party alleging facts to avoid the running of the statute.

Scanlon v. Kansas City, 325 Mo. 125, 28 S.W.2d 84, 92 (1930) (en banc). Petitioner fails to meet that burden.

Petitioner contends that her cause of action under 18 U.S.C. § 2520 did not accrue until December 29, 1987, when Leslie Albin pled guilty to an illegal wiretap in *United States v. Albin*, Case No. 87-00283-01-CR-W-6, because that is when Petitioner learned of Knox's identity and involvement in the wiretap activity.¹ Knox disagrees. Assuming arguendo, for the purposes of deciding the issue in this Petition, that Petitioner is correct in her assertion that she did not know *all* the persons involved in the allegedly illegal wiretap, the assertion is useless to Petitioner. The timing of her discovery of the identity and involvement of *all* possible defendants is immaterial to when Petitioner's cause of action accrued. Petitioner also contends that before December 29, 1987, she did not have a reasonable opportunity, through the use of due diligence, to discover Knox's involvement and identity in said wiretapping until Albin pled guilty. Knox disagrees. Essentially, Petitioner contends that before December 29, 1987, she did not discover, or through the use of due diligence could not have discovered, the information necessary to cause the statute of limitations to begin running on her claim under § 2520. Knox disagrees. Along with making these contentions, Petitioner makes two other

¹ This was Petitioner's only argument against Knox's Motion for Judgment on the Pleadings raised to the Honorable Howard F. Sachs in the district court. None of the other arguments raised by Petitioner in her Petition were raised and addressed by Judge Sachs. *Kriegesmann v. Berry-Wehmiller Co.*, 739 F.2d 357 (8th Cir.), cert. denied, 469 U.S. 1036 (1984); *Ludwig v. Marion Labs, Inc.*, 465 F.2d 114 (8th Cir. 1979).

statements that this court should find undeniably foreclose its review of this Petition.

First, Petitioner admits that on or about December 7, 1984, she discovered the allegedly illegal wiretap on her phone in her residence. (See pp. 2, 6 and 17 and Question 1 and 2 of Questions Presented of the Petition.) Second, Petitioner recognizes that the standard rule for determining when a cause of action under § 2520 accrues (when the statute of limitations begins to run) is when the Petitioner discovers or, by the exercise of due diligence, could have discovered the existence of the wiretap. Petitioner uses the phrase "basis for the cause of action" in replace of "existence of the wiretap" in an attempt to muddy the otherwise clear holdings of the case law relating to this issue, as well as the legislative intent of Congress when it passed the 1986 amendment to § 2520 adding subsection (e).

Petitioner contends that there is a conflict between the Eighth Circuit's holding in this cause and the holding in *Pavlak v. Church*, 727 F.2d 1425 (9th Cir. 1984). Petitioner suggests that there are two requirements for the statute of limitations to begin to run on Petitioner's cause of action: (1) knowledge of the existence of the wiretap; and (2) knowledge of all the parties responsible for a violation under 18 U.S.C. § 2510 *et seq.* However, a simple review of the cases discussing this issue clearly indicates that knowledge or discovery of the existence of the wiretap starts the statute of limitations running. Petitioner's discovery of the wiretap, per her own admissions, occurred on December 7, 1984 and, thus, no conflict.

Petitioner takes the "basis of the cause of action" language from the Ninth Circuit's opinion in *Pavlak v. Church*, 727 F.2d 1425, 1428 (9th Cir. 1984), to support her argument. Although the Ninth Circuit does not define what "basis of the cause of action" means, it cites as authority: *Smith v. Nixon*, 606 F.2d 1183 (D.C. Cir. 1979) (cause of action accrues when through the exercise of due diligence, plaintiff could have discovered the existence of the wiretap); and *Awbrey v. Great Atlantic and Pacific Tea Co.*, 505 F.2d 604, 609 (M.D. Ga. 1980) (cause of action accrues when plaintiff discovers that her phone calls were being intercepted); as well as, *Brown v. American Broadcasting Co.*, 704 F.2d 1296, 1304 (4th Cir. 1983) (cause of action accrues when plaintiff discovers that his communications had been intercepted). These cases make it clear that Petitioner's cause of action accrued and the limitations period began to run on or about December 7, 1984, the day she discovered the wiretap. *See also Newcomb v. Ingle*, 827 F.2d 675 (10th Cir. 1987) (there are two alternatives in deciding when a cause of action under § 2520 accrues: (1) when plaintiff discovers or, by the exercise of due diligence, could have discovered that her communications were intercepted; or (2) as soon as the interception was committed.)

Petitioner's argument that she must also have known all the parties who were responsible for the wiretap before the cause of action accrued is an erroneous statement of the law and unfounded, as evidenced by Petitioner's failure to cite even one case in support of this theory. Petitioner attempts to distinguish the Court's analysis in *Newcomb*, because *Newcomb* did not allege lack of knowledge of all defendant tortfeasors. However,

as established above, the lack of this particular allegation does not distinguish *Newcomb*, because knowledge of all possible defendants is immaterial to a determination of when the cause of action under § 2520 accrues.

It is clear from the pleadings filed by Petitioner during the divorce proceedings in *Frick v. Frick*, Case No. DR84-1285, she was aware of, at the very least, a cause of action under 18 U.S.C. § 2520 against her husband, John Frick, and others. (Appendix at pp. 27-58).

Such wiretapping, *conducted by or at the direction of respondent*, was done after he moved from the residence. . . . Such conduct is clearly illegal and the fruits thereof inadmissible in evidence. *See*, 18 U.S.C.A. § 2510-2520. . . . (emphasis added)

(Appendix at pp. 47, 56). With awareness of the cause of action and knowledge of the identity of at least one of the defendants, Petitioner could easily have sued Frick pursuant to § 2520, and sought the identity of other defendants through discovery. *See Klippel v. Watkins*, 667 S.W.2d 28, 31 (Mo. Ct. App. 1984).

In *Klippel, supra*, the court found that Petitioner was aware of the cause of action for libel and knew the identity of one of the authors of the documents and could have sued and learned of the other defendants through discovery. Therefore, his cause of action as to the second defendant was time-barred. Similarly, Petitioner's cause of action as to Knox is time-barred, and the Petition for Writ of Certiorari before this court should be denied.

Petitioner's contention that she did not know, nor through the exercise of due diligence could have discovered, Knox's involvement in the allegedly illegal wiretap

until Alvin pled guilty, stands alone. She offered no affidavit(s) nor other documentation to support this claim. The deposition excerpt that she did provide to the district court and to this court simply shows that Knox followed and took pictures of Petitioner for her husband. Certainly, this bare contention, without more, fails to meet Petitioner's burden to bring forth sufficient evidence to allow a reasonable jury to find in her favor. Therefore, Respondent respectfully requests this Court deny her Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Petitioner contends that the district court's finding that she discovered the wiretap in December, 1984, and could have sued her husband and used the discovery process to learn the identities of other persons involved is in error and conflicts with *United States v. Kubrick*, 444 U.S. 111 (1979). Even looking beyond the fact that *Kubrick* is a medical malpractice case, and beyond the fact that all the cases dealing with the statute of limitations issue as it applies to 18 U.S.C. § 2520 have concluded discovery of the existence of the wiretap starts the limitation clock (as discussed above), Petitioner's own analysis applying (logically) *Kubrick* to this case manifests Respondent's assertion that Plaintiff's cause of action accrued on or about December 7, 1984.

On p. 36 of her Petition, Petitioner states that:

In order to initiate litigation, a plaintiff must be able to plead four things: (1) an act or failure to act; (2) damage resulting from that act or failure to act (whether presumed in law or expressed); (3) that one or more specific defendants performed or failed to perform the act,

and (4) a theory on which to base recovery against the defendant(s).

Obviously, Petitioner's phrase, "[i]n order to initiate litigation" is synonymous with the phrase, "the cause of action begins to accrue for a statute of limitation purposes." Based on Petitioner's position, clearly Petitioner admits that three of the four "things" required to be pled to initiate litigation were met on or about December 7, 1984, i.e., (1); (2); and (4). Petitioner contends only that (3) was not met until Albin plead guilty in December, 1987. A review of all the facts clearly indicates (3) was also met more than two years before Petitioner filed her complaint.

The third "thing" Petitioner states a plaintiff must know, for the statute of limitations to begin to accrue, that *one or more* specific persons performed or failed to perform the act involved. (See Petition at p. 36). In this case, the act involved was the wiretapping. Petitioner states on p. 39 of her Petition that she "assumed" that her husband (now ex-husband) was involved in the wiretap and then suggests that her assumption does not rise to the level of knowledge required to fit into this third element. This is her contention even though there is no knowledge requirement within her four "things" needed to be plead. Additionally, a review of the Petitioner's pleadings filed in *Frick v. Frick*, Case No. DR84-1285, and her suggestions in opposition to Defendant's Motion for Judgment on the Pleadings filed in this case at the district court level, clearly indicate Petitioner knew that her husband and his attorneys, and others, were somehow involved in the wiretapping of her phone.

On the seventh page of Petitioner's Memorandum of Petitioner's Report on Status of Discovery Issues Post Meeting of Counsel, she stated:

Petitioner has located a potentially illegal wire tap in the home and her attorneys have seen and had read to them by respondent's attorneys certain transcripts of petitioner's private telephone conversations with persons other than respondent.

(Appendix at p. 34). This pleading was filed on or about December 10, 1984.

On the second page of Petitioner's Motion for Protective Order in Paragraph 2, Petitioner argued that she should be protected from further discovery until wire-tapped conversations were made available to her and her attorneys. (Appendix at p. 37). This pleading was filed on or about February 14, 1985.

On the second page of Petitioner's Suggestions in Support of Motion for Protective Order, Petitioner stated:

Respondent's attorneys have indicated they have tapes and transcriptions of telephone conversations between petitioner and persons other than respondent. They have also stated that these were obtained as a result of wiretap respondent or his agents established on petitioner's telephone line in her home.

(Appendix at p. 41). This pleading was filed on or about February 14, 1985.

On the first page of Petitioner's Motion to Quash Subpoena and for Protective Order from Deposition, Petitioner states that her husband "is in possession of illegally made tape recordings of wiretapped conversations

of petitioner." (Appendix at p. 43). This pleading was filed on or about February 14, 1985.

On the first page of Petitioner's Suggestions in Support of Motion to Quash Subpoena and for Protective Order from Deposition, Petitioner accuses her husband "and his attorneys" with possessing recordings and transcriptions of wiretapped conversations, and that the wiretapping was "conducted by or at the direction of respondent." (Appendix at p. 47). This pleading was filed on or about February 14, 1985.

On the second page of Petitioner's Motion for Protective Order from Deposition, Andes stated:

Petitioner is informed and believes that respondent or his representatives are in possession of illegally made tape recordings of wiretapped conversations of petitioner.

(Appendix at p. 52). This pleading was filed on or about March 26, 1985.

On the second page of Petitioner's Suggestions in Support of Petitioner's Motion for Protective Order, Petitioner stated that her husband and his attorneys "possess recordings and transcriptions of wiretapped communications between petitioner and persons other than respondent," and that said wiretapping was "conducted by or at the direction of respondent." (Appendix at p. 56). This pleading was filed on or about March 26, 1985.

Additionally, in Petitioner's Suggestions in Opposition to Defendant's Motion for Judgment on the Pleadings, Petitioner stated:

Until the date of December 26, 1987, Plaintiff, Josephine Andes, was only aware that her

husband, John W. Frick, or his representatives, had legally installed an electronic wiretapping device on her telephone line, but did not know who John W. Frick's representatives were.

(Appendix at p. 9). This pleading was filed before the district court on April 11, 1989.

Even under Plaintiff's application of *Kubrick* to this case, there is no question but that as of December 7, 1984, or at the very latest, March 26, 1985, Petitioner knew "that one or more specific defendants performed or failed to perform the act", as required by the third element of Petitioner's own analysis. It is clear from the pleadings Petitioner filed during her divorce action, and before the district court in this action, that she discovered the wiretap and knew that her husband, his attorneys, and others, were involved in the wiretapping activities. Petitioner's own analysis does not require that Petitioner know each and every defendant that may have been involved in the act performed to start the statute of limitations to accrue. As the district court properly held and the Eighth Circuit properly affirmed, Petitioner discovered the wiretap and knew that at least her husband was involved. Therefore, this Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

2.

CAN ARGUMENTS AND THEORIES RAISED BY PETITIONER THAT WERE NOT BEFORE THE DISTRICT COURT BE CONSIDERED FOR THE FIRST TIME ON APPEAL?

It is a well established general rule that a reviewing court will not consider arguments and theories not

properly presented or raised in the district court. *Kriegesmann v. Berry-Wehmiller Co.*, 739 F.2d 357, 358 (8th Cir. 1984); *Kapp v. Naturelle, Inc.*, 611 F.2d 703, 709 (8th Cir. 1979).

In *Kriegesmann*, *supra*, the plaintiff sued for age discrimination under the Age Discrimination and Employment Act. Defendant filed a motion for summary judgment asserting that plaintiff's action was untimely. *Id.* Before the district court, plaintiff argued that the time for filing did not begin to run until the severance benefits ended, as the employer's actions constituted a continuing violation. *Id.* at 358. The district court granted the motion for summary judgment. On appeal, the plaintiff alleged, for the first time, that the employer's failure to post a notice of his rights under the Age Discrimination in Employment Act, violated the Act and, therefore, the filing period was equitably tolled. The Eighth Circuit did not consider that argument because it was a theory not presented to the district court. *Id.* This court denied *Kriegesmann's* Petition for Writ of Certiorari. *Kriegesmann v. Berry-Wehmiller Co.*, 469 U.S. 1036 (1984).

In *Kapp v. Naturelle, Inc.*, Kapp filed an adversary proceeding claiming that disallowance of creditors' claims against him individually was required because the debts were corporate debts. 611 F.2d 703 (8th Cir. 1979). The bankruptcy court agreed and the district court affirmed. On appeal to the Eighth Circuit, in defense of his position, Kapp argued, *inter alia*, that the default judgments obtained against Kapp prior to the filing of the bankruptcy proceeding were fraudulently obtained. *Id.* at 708-09. This court noted that fraud was not pled or considered by the bankruptcy court. *Id.* at 709. Arguments

and theories not raised in the proceedings below are not considered by appellate courts when raised for the first time on appeal. *Id.* at 709. See also *St. Louis Developmental Disabilities Treatment Center Parents' Association v. Mallory*, 767 F.2d 518 (8th Cir. 1985); *Korgel v. United States*, 619 F.2d 16, 18 (8th Cir. 1980); *United States v. Frank*, 587 F.2d 924, 928 (8th Cir. 1978); *Ludwig v. Marion Labs, Inc.*, 465 F.2d 114, 117 (8th Cir. 1972).

As in each of these cases, Petitioner presented, for the first time on appeal, arguments and theories not raised in the proceedings to the trial court. As pointed out in the Counterstatement of the Case, Petitioner argued, in the proceedings below, that the statute of limitations did not begin to run simply because she did not know of Respondent's identity or involvement in the alleged illegal wiretap until Mr. Albin pled guilty to a criminal violation of 18 U.S.C. § 2510 *et seq.* on December 29, 1987. On appeal to the Eighth Circuit, Petitioner raised additional arguments and theories in an attempt to obtain a reversal of the trial court's finding that Petitioner's claim was barred by the applicable statute of limitations. Petitioner's arguments and theories that 18 U.S.C. § 2520(e) should not be applied retroactively and that Knox's identity and involvement was fraudulently concealed, thereby tolling any statute of limitations, were arguments and theories raised for the first time on appeal and the Eighth Circuit declined to consider them. As in *Kriegesmann*, Petitioner's request for Writ of Certiorari should be denied.

Additionally, Petitioner raises a new argument to this court. Petitioner now contends that a retroactive application of 18 U.S.C. § 2520(e) denies Petitioner her constitutional rights of due process, specifically, the "taking

clause" of the Fifth Amendment. Once again, an argument not raised below, and one not supported within her Petition.

Though the Supreme Court does not normally decide issues not presented below, it is not precluded from doing so. *Carlson v. Green*, 446 U.S. 14 (1980). It is within the discretion of the appellate courts to determine, on a case by case basis, what questions may be taken up and resolved for the first time on appeal. *Singleton v. Wolf*, 428 U.S. 150 (1976). The court may review arguments or theories for first time on appeal where the proper resolution is beyond any doubt, or where injustice might otherwise result. *Id.* at 121; *United States v. Adkinson*, 297 U.S. 391, 392 (1936).

The Eighth Circuit's refusal to consider an argument not heard below does not work substantial injustice upon the Petitioner. Petitioner suggests that she may suffer substantial injustice should this petition not be granted simply because she could not then pursue her claim for relief under § 2520, the civil remedy for a criminal violation of § 2511.² However, if substantial injustice was suffered every time a plaintiff was prevented from pursuing a claim, this Court would be granting petitions for writ of certiorari with each blink of an eye!

In an effort to provide the court with a valid reason for reviewing this case, Petitioner suggests a "plain error" review is appropriate under Fed. R. Civ. P. 51. However,

² This Court should also be aware that Respondent was indicted for violating Chapter 19 under 18 U.S.C. § 2511 and was acquitted on all counts.

Rule 51 deals with jury instructions and their objections. Rule 51 is not applicable to this case in that there are no jury instructions at issue. The Petitioner's appeal to the Eighth Circuit came as a result of the district court's granting of Respondent's Motion for Judgment on the Pleadings. Therefore, Petitioner's request for a Rule 51 "plain error" review is without merit.

Petitioner also asserts that plain error review is appropriate under Supreme Court Rule 24.1(a). The interests of justice and efficient judicial administration dictate against the exercise of this power. Petitioner alleges plain error in the district court's arguably retroactive application of § 2520(e) to her claim which accrued December 7, 1984. However, Petitioner did not challenge an alleged retroactive application of the statute at the district court level. Thus, the only issue decided by the district court was the date Petitioner's claim actually accrued. The district court properly determined that Petitioner's claim accrued more than two years prior to the bringing of the suit. The failure of Petitioner to raise the retroactivity argument precluded the trial court from an opportunity to adjudicate it on the merits. Therefore, Petitioner effectively waived this argument. Clearly, the Eighth Circuit acted within its discretion in refusing to consider the retroactivity argument. The court did not find plain error in the district court's decision, and cannot be said to have committed plain error in refusing to consider the retroactivity argument since Petitioner failed to assert it before the district court. *See Kriegesmann, supra.*

- A. Should this court choose to review Petitioner's argument, raised for the first time on appeal, that 18 U.S.C. § 2520(e) should not be applied retroactively, her claim for violation of 18 U.S.C. § 2520 is still barred by the most appropriate or most analogous, the applicable statute of limitations.

It is well established that as the reviewing court, this court may affirm the lower court's order on any ground supported by the record, even if the issue was not pleaded, tried, or otherwise referred to in the proceedings below. *Brown v. St. Louis Police Department*, 691 F.2d 393, 396 (8th Cir. 1982); *McClain v. Kitchen*, 659 F.2d 870, 873 (8th Cir. 1981).

In his Memorandum and Order, Judge Sachs concluded that Petitioner's suit under 18 U.S.C. § 2520 was barred by the *applicable* statute of limitations because there was "no potential for a cognizable issue of fact as to when plaintiff discovered a violation of sec. 2520." (Petitioner's Appendix at pp. 15-16). By her own admissions, discovery of the existence of the wiretap occurred on or about December 7, 1984. (Petition in Questions Presented 1 and 2; pp. 1, 6 and 17). Petitioner argues, for the first time on appeal, that § 2520(e), the limitation provision, cannot be applied retroactively, yet her Petition provides this court no guidance as to an appropriate alternative. Respondent proffers 47 U.S.C. § 415(b) and Mo. Ann. Stat. § 516.140 as appropriate alternatives.

In *Newcomb*, the Tenth Circuit concluded that it shall apply the most appropriate or most analogous state statute of limitations to the most analogous state private cause of action to a claim under § 2520. 827 F.2d at 677-78

(citing as authority *Board of Regents v. Tomanio*, 446 U.S. 478, 488 (1980)). The court held that a cause of action for invasion of privacy was the most analogous state private cause of action to a claim under § 2520 because, "the protection of privacy was an overriding congressional concern in enacting 18 U.S.C. § 2510-2520." *Id.* at 678. The court applied Kansas' 2-year statute of limitations because the Kansas Supreme Court had already held that this statute of limitations applied to invasion of privacy actions. *Id.* at 677, fn.3. Neither the Missouri Supreme Court nor any Missouri intermediate appellate courts have determined which statute of limitations applies to a cause of action under § 2520 or invasion of privacy.

In *Tomanio*, this Court held that where there is no specifically stated or otherwise applicable relevant federal statute of limitations for a federal substantive claim enacted by Congress, federal courts must apply the most appropriate or most analogous statute of limitations provided by the state law. 446 U.S. 478, 488 (1980). *See also Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

In *Pavlak*, the Ninth Circuit held that the 2-year statute of limitations under 47 U.S.C. § 415(b) barred Pavlak's cause of action under not only 47 U.S.C. § 207 and 605, but also 42 U.S.C. § 1983 and 18 U.S.C. § 2520, unless Pavlak could prove fraudulent concealment. 727 F.2d at 1427-29. Pavlak argued that even if 47 U.S.C. § 415(b) barred her claims under the Federal Communications Act, it could not be applied to her other civil rights claims (i.e., 42 U.S.C. § 1983 and 18 U.S.C. § 2520). *Id.* at 1427. The Court of Appeals disagreed. The Ninth Circuit cited *Johnson*, 421 U.S. 454 (1975), noting that since, in *Johnson*,

there was "no specifically stated or otherwise relevant federal statute of limitations for a cause of action under § 1981, the controlling period would ordinarily be the most appropriate one provided by state law." *Id.* at 1427. However, for its case, § 415(b) specifically addressed the alleged violation of Pavlak's rights (wiretap of the telephone of her residence). *Id.*

Where a federal statute of limitations is directly applicable to the facts, is the most analogous statute of limitations, and provides a reasonable opportunity to present civil rights claims, it is the proper statute of limitations to be applied.

Id. at 1427-28. The court concluded that "[a]pplying § 415(b) does not bar, defeat, or inhibit the *timely* assertion of civil rights claims" under 42 U.S.C. § 1983 or 18 U.S.C. § 2520. *Id.* at 1428. Applying § 415(b) to Petitioner's claim under 18 U.S.C. § 2520 as the applicable statute of limitations would not bar, defeat or inhibit the *timely* assertion of her claim. Therefore, as stated above, since her cause of action arose on or about December 7, 1984, she had until on or about December 7, 1986, to file her lawsuit. Petitioner's cause of action was properly dismissed by the district court and affirmed by the Eighth Circuit.

Knox asserts that applying the most appropriate or most analogous state statute brings the court to the same conclusion, Petitioner's cause of action under § 2520 is time barred because, the most appropriate or most analogous state statute is the 2-year statute of limitation under Mo. Ann. Stat. § 516.140. This statute of limitations limits the bringing of a cause of action for intentional and quasi-intentional torts (e.g., assault, battery, libel,

slander) to two years from the date the cause of action accrued. However, the question in this case, should this court choose to even consider this argument raised only on appeal, is: what is the most appropriate or most analogous state statute of limitations to apply to a § 2520 claim, or according to *Newcomb*, an invasion of privacy claim?

In *Barber v. Time, Inc.*, the defendant published an article about a physical ailment of plaintiff and printed her picture. 159 S.W.2d 291 (Mo. 1942). Petitioner sued based on a violation of her right to privacy. *Id.* The Supreme Court discussed the right to privacy, recognized an individual's rights to such, concluded that such an article of news could involve both libel and an invasion of privacy, and the action could be stated in separate counts. *Id.* at 296. The court noted that recovery could be had on the libel count if the statements made were untrue, while recovery for true statements would be limited to the invasion of a privacy count. *Id.*

Knox asserts that *Barber* and more recent cases in Missouri discussing a cause of action for invasion of privacy, although finding invasion of privacy a separate cause of action from libel, continue to compare these two causes of action, thereby evidencing that, in Missouri, a cause of action for invasion of privacy is most analogous to a cause of action for libel.

The Ninth Circuit has held that California's one year statute of limitation governing defamation actions also applies to actions for invasion of privacy. *Fleury v. Harper & Row, Publishers, Inc.*, 698 F.2d 1022, 1027 (9th Cir. 1983). In *Fleury*, the plaintiffs filed suit against the publisher for

invasion of privacy, libel, intentional infliction of emotional distress and injunctive relief. *Id.* The district court granted defendant's motion for summary judgment based on the applicable state statute of limitations, dismissing the entire action and the Court of Appeals affirmed.³

The district court in *Smith v. Esquire, Inc.*, held Maryland's one-year statute of limitations governing libel and slander applicable to an invasion of privacy action based on a false light theory. 494 F.Supp. 967, 970 (D. Md. 1980). The court noted that although Maryland appellate courts had not addressed this issue, it felt that the Maryland court would find the libel statute of limitations applicable, given the similarity between the libel claim and the invasion of privacy claim based on false light theory. *Id.* "To hold otherwise would severely undercut the policy considerations which led to the enactment of the one-year statute governing defamation cases." *Id.*

The holdings in *Fleury* and *Smith* support the logical conclusion that an action for invasion of privacy is most analogous to an action for libel. Therefore, if this Court chooses to apply a state statute of limitations in its determination of this Petition for Writ of Certiorari, it should apply the 2-year statute of limitations under Mo. Ann. Stat. § 516.140. As additional support for this court applying § 516.140 to this alleged violation of Chapter 19 of 18

³ In *Fleury*, plaintiffs also attempted to argue on appeal that the one year statute of limitations denied them due process of law. However, the Ninth Circuit refused to consider the argument because it was not made in the district court, nor in Plaintiffs' Motion to Alter or Amend the Judgment. 698 F.2d at 1027.

U.S.C., Chapter 19 requires the defendant to: *intentionally* intercept wire, oral, or electronic communication (18 U.S.C. § 2511(1)(a)); *intentionally* use electronic, mechanical, or other device to intercept any oral communication (18 U.S.C. § 2511(1)(b)); *intentionally* disclose contents of any wire, oral, or electronic communication (18 U.S.C. 2511(1)(c)); or *intentionally* use of any wire oral communication (18 U.S.C. § 2511(1)(d)).

Knox asserts that to recover under § 2520, Petitioner must essentially present proof of a tort, invasion of privacy, *intentionally* committed, in other words, present proof that an intentional tort was committed. Therefore, pursuant to the Missouri 2-year statute of limitations relating to intentional torts, Mo. Ann. Stat. § 516.140, Petitioner's claim under § 2520 is barred by the most appropriate or most analogous state statute of limitations. As Judge Sachs concluded, Petitioner's claim is barred by the applicable statute of limitations. (Petitioner's Appendix at p. 16).

CONCLUSION

Petitioner discovered the existence of the wiretap on December 7, 1984. Before the district court, Petitioner argued solely that because she did not know of Respondent's involvement in the wiretapping of her house until Albin pled guilty in December of 1987. Both the United States District Court for the Western District of Missouri and the United States Court of Appeals for the Eighth Circuit held that such lack of knowledge does not toll the statute of limitations and her cause of action is barred by

the applicable statute of limitations. Contrary to what Petitioner suggests, there is no direct conflict between this decision of the Eighth Circuit and the decision of this Court in *Sohn v. Waterson*, 84 U.S. 596 (1873). A reviewing court shall not consider arguments and theories not properly presented or raised in the district court. Therefore, Petitioner's argument of retroactivity should not be addressed by this Court. Regardless, the courts below properly concluded that Petitioner's claim was barred by an applicable statute of limitations.

There is no conflict between the decision of the Eighth Circuit in this cause and the Ninth Circuit's decision in *Pavlak*, relating to when the cause of action under 18 U.S.C. § 2520 accrues. All cases discussing when the statute of limitations period begins to accrue for purposes of a civil action pursuant to 18 U.S.C. § 2520 have concluded that the period begins when the plaintiff discovers, or should have discovered the existence of the wiretap. In this case, when Petitioner discovered the existence of the wiretap is undisputed. Additionally, even utilizing the "critical facts" analysis discussed by Petitioner, it is clear that all of such "critical facts" were clear to Petitioner on December 7, 1984, or at the very latest, by the end of March, 1985. Her claim was untimely and properly dismissed. Therefore, her Petition for Writ of Certiorari should be denied.

As noted in Supreme Court Rule 10, "review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore." As discussed in this Brief in Opposition, there are no special nor important reasons for this Court

to grant this Petition. There are no conflicts between decisions of the United States courts of appeals as Petitioner suggests.

WHEREFORE, for the foregoing reasons, Respondent respectfully prays this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit filed by Josephine A. Andes, grant Respondent double costs under Supreme Court Rule 43.7, and for any and all other relief this Court deems just and proper.

Respectfully submitted,

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Attorneys for Respondent

App. 1

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JOSEPHINE A. ANDES,)	
)	
Plaintiff,	)	Case No. 88-
	)	1152-CV-W-6
v.)	
LESLIE E. ALBIN,)	
)	
and)	
)	
THEODORE R. KNOX,)	
)	
Defendants.)	

MOTION FOR JUDGMENT ON THE PLEADINGS

COMES NOW, individual Defendant Theodore R. Knox, by and through counsel, and moves this Honorable Court for a Judgment on the Pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

Attached hereto and incorporated herein by reference are Suggestions in support of Defendant Knox's Motion for Judgment on the Pleadings.

WHEREFORE, based upon the foregoing, Defendant Knox herein prays for an order of this Court granting his motion for Judgment on the Pleadings and any and all other relief this Court deems just and proper.

Respectfully submitted,
KOENIGSDORF & WYRSCH, P.C.

By: /s/ Michael P. Joyce
JAMES R. WYRSCH #20730
MICHAEL P. JOYCE #38501
1006 Grant Avenue
10th Floor
Kansas City, Missouri 64106
(816) 221-0080

ATTORNEYS FOR DEFENDANT
KNOX

I hereby certify that a copy of the foregoing was mailed,
this 30th day of March, 1989, to:

Mr. William H. Pickett
William H. Pickett, P.C.
Interstate Building
Fourth Floor
417 East 13th Street
Kansas City, Missouri 64106

/s/ Michael P. Joyce

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JOSEPHINE A. ANDES,)	
)	
Plaintiff,	)	Case No. 88-
	)	1152-CV-W-6
v.)	
LESLIE E. ALBIN,)	
)	
and)	
)	
THEODORE R. KNOX,)	
)	
Defendants.)	

SUGGESTIONS IN SUPPORT OF
MOTION FOR JUDGMENT ON THE PLEADINGS

COMES NOW, Defendant Knox, and in support of his
Motion for Judgment on the Pleadings, states as follows:

Background

In her Complaint for Damages, Plaintiff alleges that between April, 1984, and December, 1984, Defendant Knox intercepted, disclosed or intentionally used the home telephone conversations of Plaintiff (formerly Josephine Frick), without the knowledge or consent of Plaintiff, in violation of Chapter 119 of 18 U.S.C. Plaintiff also alleges that Plaintiff did not have reasonable opportunity to discover either the violation or the fact that her rights under 18 U.S.C. § 2511(1)(a) had been violated until December 29, 1987, when Leslie Albin pleaded guilty to criminal violation of 18 U.S.C. §2511(1)(a).

App. 4

Discussion

18 U.S.C. §2520 provides for the recovery of civil damages for the violation of 18 U.S.C. §2510, *et seq.* 18 U.S.C. §2520(e) provides that:

A civil action brought under this section may not be commenced later than 2 years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

Plaintiff commenced her civil action on November 22, 1988, therefore, for Plaintiff to survive a statute of limitation defense, she must show she did not have a reasonable opportunity to discover the violation prior to November 22, 1986.

Although pleadings are generally inadmissible in evidence in the same trial, such is not true of abandoned pleadings or pleadings in another lawsuit. *Manahan v. Watson*, 655 S.W.2d 807, 809 (Mo. App. 1983); *Littell v. Bi-State Transit Development Agency*, 423 S.W.2d 34 (Mo. App. 1967). A pleading filed by a party in a cause which states facts relevant to issues in another cause on trial, in which the party filing the pleading is a party, is admissible against the party making it as an admission. *Ross v. Philip Morris & Co.*, 328 F.2d 3, 14-15 (8th Cir. 1964); *Simmons v. Kansas City Jockey Club*, 66 S.W.3d 119 (Mo. 1933).

In the prior civil proceeding, *In re the Marriage of Josephine Antionette Frick v. John William Frick*, Case No. DR84-1285, in the Circuit Court of Jackson County, Missouri, the Petitioner, Josephine Frick (now Josephine Andes, Plaintiff in this matter), filed a number of pleadings that indicate that Plaintiff and her attorneys had, in fact, discovered the alleged violation or the fact that her

rights had been violated under 18 U.S.C. §2511(1)(a) well before November 22, 1986.

As early as December 10, 1984, in Plaintiff's Memorandum of Petitioner Reporting the Status of Discovery Issues Post Meeting of Counsel (attached hereto and incorporated by reference as Exhibit A), Plaintiff discovered the alleged violation.

Petitioner has located a potentially illegal wiretap in the home and her attorneys have seen and had read to them by respondent's attorneys certain transcripts of petitioner's private telephone conversations with persons other than respondent. (See Exhibit A, Page 7.)

On February 14, 1984, Plaintiff through her attorneys, filed a Motion for Protective Order, Suggestions in Support of said Motion, as well as, a Motion to Quash Subpoena and for a Protective Order from Deposition, and Suggestions in Support of said Motion to Quash. (See Exhibits B-E, attached hereto and incorporated by reference). In the Suggestions in Support of the Motion for Protective Order, Plaintiff stated that Mr. Frick's attorneys indicated that they had tapes and transcriptions of telephone conversations between Plaintiff and persons other than Mr. Frick. Also,

[s]uch wiretapping and taping is clearly illegal and the making and dissemination of same is prohibited under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §2510-2520. . . . (See Exhibit C, Page 2.)

Again, in Plaintiff's Suggestions in Support of Mrs. Frick's Motion to Quash, she states that the wiretapping conducted by Mr. Frick or at his direction, is "clearly

illegal" and cites 18 U.S.C. §2510-2520. (See Exhibit E, Page 1.)

On March 26, 1985, Plaintiff, through her attorneys, filed a Motion for Protective Order from Depositions and Suggestions in Support thereof. (See Exhibits F and G, attached hereto and incorporated by reference.)

Petitioner is informed and believes that respondent or his representatives are in possession of illegally made tape recordings of wiretapped conversations of petitioner. (See Exhibit F, Page 2.)

In the Suggestions in Support, Mrs. Frick indicates her knowledge of the wiretapping and states that such activity is "clearly illegal" citing 18 U.S.C.A. §2510-2520. (See Exhibit G, Page 2.) In addition, the recordings and transcriptions from the tapes were requested by Plaintiff in the divorce case, in her First Request for Production of Documents, filed on September 7, 1984. (See Exhibit G, Page 3.)

WHEREFORE, for the foregoing reasons, Defendant Knox respectfully moves this Court to grant his Motion for Judgment on the Pleadings and any and all other relief this Court deems just and proper.

App. 7

Respectfully submitted,

KOENIGSDORF & WYRSCH, P.C.

By: /s/ Michael P. Joyce

JAMES R. WYRSCH #20730

MICHAEL P. JOYCE #38501

1006 Grand Avenue

10th Floor

Kansas City, Missouri 64106

(816) 221-0080

ATTORNEYS FOR DEFENDANT
KNOX

I hereby certify that a copy of the
foregoing was mailed, this 30th
day of March, 1989, to:

Mr. William H. Pickett

William H. Pickett, P.C.

Interstate Building

Fourth Floor

417 East 13th Street

Kansas City, Missouri 64106

/s/ Michael P. Joyce

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JOSEPHINE A. ANDES,)	
)	
Plaintiff,	)	Case No.
v.	)	88-1152-CV-W-6
LESLIE E. ALBIN, et al.,)	
)	
Defendants.)	

PLAINTIFF'S SUGGESTIONS IN OPPOSITION TO
DEFENDANT'S MOTION FOR JUDGMENT
ON THE PLEADINGS

COMES NOW the plaintiff herein, and respectfully submits the following Suggestions in Opposition to Defendant Theodore R. Knox's Motion for Judgment on the Pleading.

Background

This case arises out of illegal wiretapping activities performed by the defendants of the plaintiff's telephone line leading to and in her home located at 1724 North 11th Street, Blue Springs, Missouri, during the time period beginning sometime in April 1984, through and including December 1984, while plaintiff Josephine A. Andes was involved in a divorce proceeding. During that period of time, defendants Leslie E. Albin and Theodore R. Knox installed electronic wiretapping devices upon the telephone lines leading to and inside the residence of plaintiff Josephine A. Andes, and thereafter made electronic recordings of private telephone conversations of

plaintiff with third persons. Plaintiff discovered the illegal wiretapping on or about December 7, 1984.

Argument

At the time of discovery, plaintiff believed her husband, John W. Frick, to be the only person responsible for the electronic wiretapping devices to be installed on her telephone lines.

Prior to the date of December 26, 1987, plaintiff Josephine A. Andes had no knowledge of the identity of defendants Leslie E. Albin and Theodore R. Knox or of their participation in the installation of said electronic wiretapping devices. Plaintiff's knowledge of the defendants' participation came only after defendant Leslie E. Albin entered a plea of guilty in the case styled *United States of America v. Leslie E. Albin*, cause number 87-00283-01-CR-W-6. Until the date of December 26, 1987, plaintiff Josephine A. Andes was only aware that her husband, John W. Frick, or his representatives, had illegally installed an electronic wiretapping device on her telephone line, but did not know who John W. Frick's "representatives" were. Only after the plea entered by defendant Leslie E. Albin in the above-mentioned criminal action did plaintiff become aware of the identity of the defendants in the instant action.

Therefore, plaintiff did not have a reasonable opportunity to discover the violation committed by defendants Leslie E. Albin and Theodore R. Knox until after the date upon which defendant Albin entered his plea of guilty in the criminal case against him.

Clearly, plaintiff is within the statute of limitations to bring this action against defendants Leslie E. Albin and Theodore R. Knox, and discovery should go forward to determine if she had any knowledge of defendants Leslie E. Albin and Theodore R. Knox prior to defendant Leslie E. Albin's plea of guilty in the criminal case before defendant's Motion for Judgment on the Pleadings should be granted.

It is plaintiff's position that the question of when she had actual knowledge of defendants Leslie E. Albin and Theodore R. Knox' participation in the installation of the electronic wiretapping device on the telephone line leading to and in her residence is a factual issue and should not be resolved by the Court as a question of law. As shown in *E. D. Systems v. Southwestern Bell Tel.*, 674 F.2d 453 (5th Cir. 1982), the court held unless there is no room for ordinary minds to differ as to the proper conclusions to be drawn from the evidence, the issue of notice is factual and should not be resolved by the court. The facts in the instant case clearly show that the plaintiff had no reasonable opportunity to discover the identity of defendants Leslie E. Albin and Theodore R. Knox prior to defendant Albin's plea of guilty in the criminal case against him, and therefore no knowledge of the violation of §18 U.S.C. 2510 by defendants Leslie E. Albin and Theodore R. Knox.

Even as shown in the various attachments to defendant's Suggestions in Support of Motion for Judgment on the Pleadings, nowhere are there any references to defendants Leslie E. Albin and/or Theodore R. Knox, nor do the attachments name defendants Albin or Knox as the representatives of John W. Frick.

In fact, as can be seen from the attached Exhibits "C", "D", and "E", that are from the deposition of John William Frick taken June 4, 1984, which was a typographical error and should read as June 4, 1985, and continued on the date of June 20, 1985, (Exhibits "A" and "B" hereto), it is clear, on page 85 of the deposition attached hereto, Mr. Frick affirmatively, under oath, stated that he only employed Ted Knox to take photographs, not to do anything else. The plaintiff specifically was told under oath by her husband at that time what Ted Knox representation was and it did not include wiretapping.

Likewise, the plaintiff testified in her deposition taken on the date of August 30, 1985, and as shown in the attached Exhibits "F", "G", "H" and "I" the extent of plaintiff's knowledge and information of the wiretapping on the telephone line leading to and in her in her home.

WHEREFORE, in light of the above and foregoing, plaintiff respectfully suggests this Honorable Court deny defendant's Motion for Judgment on the Pleadings.

Respectfully submitted,

/s/ WHP

William H. Pickett #21324
WILLIAM H. PICKETT, P.C.
417 East 13th Street
Kansas City, Missouri 64106
816/221-4343

ATTORNEY FOR PLAINTIFF

I hereby certify that a copy of
the above and foregoing was
mailed, postage, prepaid, this
11th day of April, 1989, to:

James R. Wyrsh, Esq.
Michael P. Joyce, Esq.
KOENIGSDORF & WYRSCH, P.C.
1006 Grand Avenue
10th Floor
Kansas City, Missouri 64106

/s/ WHP
Attorney for Plaintiff

EXHIBIT "A"

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

In Re The Marriage Of)	
JOSEPHINE ANTOINETTE FRICK,)	
)	
Petitioner,	)	No. DR84-1285
)	
and)	
)	
JOHN WILLIAM FRICK,)	
)	
Respondent.)	

DEPOSITION OF JOHN WILLIAM FRICK,

produced, sworn and examined on Tuesday, the 4th day of June, 1984, between the hours of 8 o'clock in the forenoon and 6 o'clock in the afternoon of that day, pursuant to notice, at the law offices of Thayer, Bernstein & Bass, 9200 Ward Parkway, Kansas City, Jackson County, Missouri, before

THERESA M. TAYLOR
Certified Shorthand Reporter

a Notary Public in and for the State of Missouri, in a certain cause as set out above; taken on the part of the Petitioner.

APPEARANCES:

The Commissioner: Ms. Laura A. Cochet
Suite 206-8800 Blue Ridge
Blvd.
Kansas City, Missouri 64138

For the Petitioner: Ms. Charlotte P. Thayer
Thayer, Bernstein & Bass
Suite 175 - 9200 Ward
Parkway
Kansas City, Missouri 64114

For the Respondent: Ms. Rose Anne Nespica
219 North 7-Highway
Blue Springs, Missouri 64015

For: Dorothy C. Parker
8609 East 78th Terrace
Kansas City, Mo. 64138

EXHIBIT "B"

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

In Re The Marriage Of)
JOSEPHINE ANTOINETTE FRICK,)
Petitioner,) No. DR 84-1285
and)
JOHN WILLIAM FRICK,)
Respondent.)

DEPOSITION OF JOHN WILLIAM FRICK,
(continued)

produced, sworn and examined on June 20, 1985, between the hours of 8 a.m. and 6 p.m. of that day, at the law offices of Thayer, Bernstein & Bass, Suite 175, 9200 Ward Parkway, Kansas City, Jackson County, Missouri, before:

Dorothy C. Parker
Certified Shorthand Reporter

a notary public in and for the State of Missouri, in the enue and style set out above; taken on behalf of the Petitioner.

APPEARANCES

THE COMMISIONER:	MS. LAURA A. COCHET 8800 Blue Ridge Blvd. - Suite 206 Kansas City, Missouri 64138
For the Petitioner:	MS. CHARLOTTE P. THAYER Thayer, Bernstein & Bass 9200 Ward Parkway - Suite 175 Kansas City, Missouri 64114
For the Respondent:	MS. ROSE ANNE NESPICA 219 North 7 Highway Blue Springs, Missouri 64015 and MR. MICHAEL ALBANO Paden, Welch, Martin, Albano & Graeff 311 West Kansas Independence, Missouri 64050
Also Present:	Josephine A. Frick, Petitioner

EXHIBIT "C"

* * *

(p. 85) A. She has been seen dating Bob McDaniels.

Q. What do you mean she's been seen dating him? Explain that to me.

A. Someone followed her. They went to a restaurant and went to a movie.

Q. Who followed her?

A. Ted Knox.

Q. Who is Ted Knox?

A. He's a private investigator.

Q. Someone you employed to follow her?

A. Yes.

Q. When did you first employ him to follow Jo Ann?

A. Right after we separated.

Q. And how recently has he followed her?

A. That was basically it. I found out, you know, what I wanted to know as far as whether or not I could make the relationship - whether she was being honest with me. And I basically knew before that. But I guess you just want to know for sure.

Q. How much money have you paid Ted Knox?

A. I don't remember. It was probably about - I don't remember. \$300 or \$400.

Q. Did you employ Ted Knox to do anything other than follow Jo Ann?

A. No. Oh, he took some pictures.

EXHIBIT "D"

(p. 86) Q. When did he take pictures?

A. The day he followed her.

Q. The day? He followed her only one day?

A. I really don't know how often he followed her. But I know, you know, he told me about Bob McDaniels, and he took pictures on that day.

Q. Pictures of Jo Ann going out to dinner and going to a show?

A. Yes. And it was like a week after we were separated or very shortly thereafter.

Q. And you think that's evidence she was having an affair with Bob McDaniels?

A. Well, as I said when you said had she had relationships, I said, "I don't know how far you want to go."

Q. Do you consider that that she was having an affair with Bob McDaniels?

A. No. I'd say that was a date.

Q. All right. Did Ted Knox take pictures of Jo Ann with anyone else?

A. No. Not that I know of.

Q. Did he follow her when she was involved in any activities with anyone else?

A. Not to my knowledge.

Q. Did a person named DeMoe, under either the

EXHIBIT "E"

(p. 87) direction of Ted Knox or directly for you, follow or otherwise attempt to obtain information on Jo Ann's activities?

A. He didn't do anything under my direction, nobody by that name.

Q. You know who this man is; do you not?

A. I know who DeMoe is.

Q. Does Ted Knox have an occupation, other than as a detective, private detective?

A. I don't know.

Q. You don't know whether he is employed by a police department?

A. No.

MS. THAYER: I'd like to take a break for a few minutes.

(A recess was taken.)

Q. (By Ms. Thayer) Mr. Frick, did you ever cause any wiretapping devices to be established in the home at 1724 North 11th Street Court?

A. I wish to invoke the Fifth Amendment privilege against self-incrimination, and I decline to answer that question on the grounds that it might tend to incriminate me.

MS. THAYER: If the Court please, I object to that. If one is going to invoke the

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

JOANN FRICK,)	
Plaintiff,)	
)	
vs.	)	No. CV85-013050
)	
CLAUDE W. JONES and)	
CHRISMAN-SAWYER BANK,)	
Defendants.)	

DEPOSITION OF JOSEPHINE ANTOINETTE FRICK,
produced, sworn and examined on Friday, the 30th day of
August, 1985, between the hours of 8:00 o'clock in the
forenoon and 6:00 o'clock in the afternoon of that day, at
the law offices of Blackwell, Sanders, Matheny, Weary &
Lombardi, 600 Five Crown Center, 2480 Pershing Road,
Kansas City, Missouri, before:

SUSAN G. BYERS, C.S.R.
Registered Professional Reporter
of
JAY E. SUDDRETH & ASSOCIATES
450 Ozark National Life Building
906 Grand Avenue
Kansas City, Missouri 64106
(816) 471-2211

a Certified Shorthand Reporter within and for the State of Kansas (the character of the Notary having been expressly waived by the parties herein);

Taken on behalf of Defendants pursuant to Notice to take Depositions.

* * *

EXHIBIT "F"

(p. 25) Q What else did he say to you?

A. That's all, sir.

Q. Has your telephone ever been tapped?

A. Yes, sir.

Q. Who tapped it?

A. I assume my husband, John William Frick.

Q. Do you know what he has on those recordings?

A. No, I don't.

Q. Do you know who the conversations were with?

A. No, I don't

Q. Were those recordings made while you were living with your husband, John Frick?

A. No, he was out of the home at the time.

MR. PICKETT: Do you mean he was no longer living there?

A. Yes, he was no longer living there.

Q. (BY MR. SANDERS) Have you ever been able to learn anything at all about what evidence he has in those taped telephone conversations of yours?

MR. PICKETT: Object to the form of the question. It implies something of that nature, it rises to a level of what legally is called

EXHIBIT "G"

(p. 26) evidence, therefore, I object to the form of the question, calls for -

MR. SANDERS: I'll reword it.

MR. PICKETT: I'm not through yet. Are you withdrawing your question?

MR. SANDERS: Yes.

Q. (BY MR. SANDERS) Do you have any idea of what information or conversations are recorded -

A. No, sir, I wouldn't have -

Q. - in those recordings that your husband made when he tapped your telephone?

A. No, sir, I wouldn't have any idea.

Q. Do you know what prompted your husband to tap your telephone?

MR. PICKETT: Object to the form of the question. Calls for the mental state of mind of somebody else, calls for speculation and conjecture.

Go ahead.

A. No, I don't.

Q. (BY MR. SANDERS) What has been your relationship with Dr. Whitley, your physician?

A. My relationship with Dr. Whitley is he is my doctor, first off, has been since 1978, since my husband and my separation we have been to

* * *

EXHIBIT "H"

(p. 36) Q Yes, there is on the first floor.

A. Okay.

Q. Where else have you been to dinner, we have mentioned the American Restaurant, the Raphael Hotel?

A. I can't remember the others.

MR. PICKETT: Just your best recollection is all you are entitled to.

Q. (BY MR. SANDERS) Were you married at the time?

A. I am still married, sir.

Q. Was he married?

A. No, sir.

Q. Did he know you were married?

A. I was separated, sir.

Q. Did he know you were married?

A. Yes, sir. -----

Q. Have you had any telephone conversations with Dr. Whitley?

A. Yes, sir.

Q. Do you know if your husband recorded any of those telephone conversations with Dr. Whitley?

A. I have no idea.

Q. Have you ever asked your husband if he had any recordings?

EXHIBIT "I"

(p. 37) A. I have asked my husband if he has recordings, yes, tapes, yes.

Q. What has he told you?

A. No, he has no tapes.

MR. PICKETT: That's what he told you? -

THE WITNESS: Yes, sir.

MR. PICKETT: You have to make that clear for the record.

Q. (BY MR. SANDERS) How did you discover that the was tapping your telephone?

A. Ed Spalty, which was my attorney at that time, I think Mr. Albano told Ed Spalty that John had been wiretapping my phone.

Q. Have you ever said any words of endearment or affection to Dr. Whitley?

A. I can't think of any, no, sir.

Q. Has he ever said any to you?

A. I can't think of any, no, sir.

Q. Well, we also subpoenaed today, but he had to go out of town, one David Andes, do you know Mr. Andes?

A. Yes, sir.

Q. Have you had sexual relations with Mr. Andes?

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JOSEPHINE A. ANDES,)	
)	
Plaintiff,	)	Case No.
	)	88-1152-CV-W-6
v.)	
LESLIE E. ALBIN,)	
AND	)	(Filed
THEODORE R. KNOX,	)	Apr. 17, 1989)
)	
Defendants.)	

REPLY SUGGESTIONS IN SUPPORT OF MOTION
FOR JUDGMENT ON THE PLEADINGS

COMES NOW Defendant Knox, by and through counsel, and, in support of his Motion for Judgment on the Pleadings, states as follows:

1. 18 U.S.C. Section 2520(e) requires that a lawsuit under this section cannot be brought later than two years after the date upon which the Plaintiff first has a *reasonable opportunity to discover* the violation. (Emphasis added.)

2. Courts have discussed the issue of when a cause of action under Section 2520 accrues. *See Brown v. American Broadcasting Company*, 704 F.2d 1296 (4th Cir. 1983) (when plaintiff discovers that communications have been intercepted); *Smith v. Nixon*, 606 F.2d 1183 (D.C. Cir. 1979) (when through the exercise of reasonable diligence plaintiff could have discovered the existence of the wiretap); *Awbrey v. Great Atlantic & Pacific Tea Company*, 505 F. Supp. 604 (D.C. Ga. 1980) (when the plaintiff discovers

that phone calls were being intercepted); *Cole v. Kelley*, 438 F. Supp. 129 (C.D. Cal. 1977) (when plaintiff acquires knowledge that he may have a potential claim). Plaintiff admits in her Suggestions in Opposition that she "discovered the illegal wiretapping on or about December 7, 1984." (See p. 1). Plaintiff's contention that because she did not know the names of all the parties that may have been involved in the wiretapping, the statute of limitations tolls, is clearly an erroneous statement of the law. Section 2520(e) and case law indicate that the statute of limitations begins to run at the time plaintiff discovers or through exercise of due diligence could have discovered the existence of the wiretap. The identity of Defendant Knox and his alleged participation in the installation of electronic surveillance equipment could have been learned upon the timely filing of this lawsuit through the discovery process.

3. In *Newcomb v. Ingle*, the Tenth Circuit affirmed the district court's ruling that the filing of a motion to suppress intercepted recordings established the plaintiff's actual knowledge of a violation and, therefore, barred his Section 2520 claim. 827 F.2d 675, 679 (10th Cir. 1987). The plaintiff contended that the defendant fraudulently concealed a conspiracy to use the tapes illegally in a criminal proceeding against him, and therefore the statute should be tolled. The court rejected that argument, concluding "as set out in [the plaintiff's] own pleadings, there is no potential for a cognizable issue of fact on a theory of fraudulent concealment." *Newcomb*, 827 F.2d at 679. As in the case at hand, as set out in Plaintiff's own pleadings in this case and in the pleadings of the prior divorce action (attached to Defendant's Suggestions in Support of

Motion for Judgment on the Pleadings), there is no potential for a cognizable issue of fact as to when the Plaintiff discovered a violation of Section 2520. Therefore, Plaintiff's cause of action against Defendant Knox is barred by the statute of limitations.

WHEREFORE, for the reasons stated herein and in his Suggestions in Support of the Motion for Judgment on the Pleadings, Defendant Knox respectfully moves this court to grant his Motion for Judgment on the Pleadings and any and all other relief this court deems just and proper.

Respectfully submitted,

KOENIGSDORF & WYRSCH, P.C.

By: /s/ Michael P. Joyce

JAMES R. WYRSCH #20730

MICHAEL P. JOYCE #38501

1006 Grand Avenue

Tenth Floor

Kansas City, MO 64106

(816) 221-0080

ATTORNEY FOR DEFENDANT

I hereby certify that a copy
of the foregoing was mailed
this 17th day of April, 1989,
to:

William H. Pickett

417 E. 13th Street

Kansas City, MO 64106

/s/ Michael P. Joyce

Attorney for Defendant

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

In Re the Marriage of:)	
JOSEPHINE ANTIONETTE)	
FRICK,	)	Case No.
	)	DR84-1285
Petitioner,	)	Division 10
)	
v.)	
)	
JOHN WILLIAM FRICK,)	
)	
Respondent.)	

MEMORANDUM OF PETITIONER
REPORTING STATUS OF DISCOVERY
ISSUES POST MEETING OF COUNSEL

COMES NOW Petitioner, through her attorneys, and herewith submits the following report of the meeting between counsel for the parties and Mr. David Stover, attorney for Roger Prock per the Court's Order of November 27, 1984:

Respondent's Motion for Protective Order

Respondent moved to limit access to records of businesses in which he is involved on the basis that confidential information might disseminate to competitors or others for an improper purpose. Petitioner also has such concerns although no protective order effort on her behalf has been made at this time.

1. Areas of Agreement:

The parties agree only to use information obtained during the course of discovery for the purpose of this action and to refrain from disclosing same to competitors,

etc. Of course, admissible evidence so obtained may be used in depositions or at trial.

2. Areas of Disagreement:

None.

Petitioner's First and Second Requests
for Production of Documents

Petitioner has filed her First and Second Requests for Production of Documents which ask respondents to produce various business records of his, J R Management Company, Prock Drug Co., Inc. and MoWinco, Inc.. Respondent has not produced documents in response to the First Request as the same is subject to his Motion for Protective Order. The Second Request sought production on December 6 but there has been no response to this as well. Respondent objects that the Requests are burdensome and oppressive in their scope. Respondent and his business associate, Mr. Roger Prock, whose interests were represented by attorney David Stover at the meeting, also are concerned that certain personal financial information of Mr. Prock's might be disclosed. Petitioner requires the information to value the businesses since she is co-signer of a note for Prock Drug, Inc. and the shares in said concern together with MoWinco, Inc. are marital property. J R Management Company was also operated during the marriage and respondent was involved therein.

1. Areas of Agreement:

The parties agree that appraisals of the value of any interests owned jointly or separately in Prock Drug Company, Inc., MoWinco, Inc. and J R Management Co. are

appropriate. An appraisal of the value of certain stock in petitioner's name in Hamiltonian Industries is appropriate as well although respondent has not yet commenced discovery in this regard.

The parties and Mr. Stover generally agree that documents or things pertaining solely to respondent's activities, assets or interests may be obtained by petitioner. In addition, records from Prock Drug, MoWinco and J R Management for the past five (5) years would be appropriate for petitioner to obtain.

Petitioner's attorneys have agreed to further confer with the accountants retained to appraise this property in an effort to cull certain documents from the First and Second Requests to reduce the amount of paperwork involved. The accountants will write to Mr. Albano and include this list in said correspondence. Respondent and the businesses will produce the documents listed so long as petitioner reduces the number of documents requested. The parties also recognize that on-site inspections are appropriate and the same will be allowed. All individuals involved including personnel of the various businesses will be cooperative and courteous. Photocopies will be made available upon request at a reasonable charge.

2. Areas of Disagreement or No Agreement and Reasons Therefore:

Petitioner has indicated that prior to the marriage approximately six (6) years ago and shortly thereafter she worked for the drug concerns and certain of her pay was

diverted into the business. Petitioner requests the document time limitation be extended to include any such period if the requested documents concern this subject.

The subject will remain open until a refined list of business records is presented. Counsel for the parties and Mr. Stover will cooperate in resolving issues related to this particular discovery.

Petitioner, other than one or two Interrogatories, has not received any discovery requests concerning the Hamiltonian Industries stock and any issue in this regard necessarily may not be resolved at this time. Petitioner does have a limited amount of access to this information.

Motion for Contempt Against CharterBank

Petitioner noticed up and took the deposition of the custodian of records of CharterBank of Independence. Petitioner subpoenaed the contents of a \$740,000 loan file upon which she is a co-signer. The records custodian refused to produce various records in the file except for the note and security agreement which bore petitioner's signature. Petitioner moved to have the custodian held in contempt. Respondent, not the bank or Mr. Roger Prock, prior to the date and time noticed for the deposition, moved for a protective order on the ground certain of the documents contained personal financial information. The bank felt it could not produce the entire file without risking liability to Mr. Prock.

1. Areas of Agreement:

The parties agree that the bank may provide the entire contents of the loan file to the Court for incamera

inspection. Respondent will submit those documents he has that are also in the loan file to the Court. Except for the documents listed below and upon verification that the same documents appear in the bank file, the petitioner will accept same from respondent rather than the bank.

2. Areas of Disagreement or No Agreement and Reasons Therefor:

The petitioner will persist in attempting to obtain the bank records respondent does not have.

Mr. Prock's attorney, Mr. Stover, insists that a personal financial statement and an appraisal of real property exclusive to Mr. Prock are not discoverable. Petitioner believes they are discoverable as their production is calculated to lead to the discovery of admissible evidence. The respondent and Mr. Prock were and are closely engaged in joint business ventures, including at one time a partnership. The financial statement may include valuations by Mr. Prock of the businesses which would be relevant to the appraisals of respondent's interests in said businesses. This information is not privileged and there is otherwise no bar to discovery of it.

Petitioner also is in disagreement with the present description of the contents of the file. The records custodian of the bank stated an inventory of the drug stores was in the file and the deposition clearly shows he viewed the file just a short time before making this statement. There is also no set of audited financial statements in this file.

No agreement could be reached with respect to petitioner's request for costs and attorneys fees in connection

with the fruitless deposition of the bank's record custodian.

**Motion to Compel
Answers to Interrogatories and
Motion for Sanctions**

1. Areas of Agreement:

The parties agreed generally that if the other party answered all pending Interrogatories that Motions for Sanctions would either be withdrawn or not filed.

**2. Areas of Disagreement or No Agreement and
Reasons Therefor:**

Petitioner will answer all pending Interrogatories to her but would preserve objections, if any, for the trial and by answering would not waive the same. Petitioner suggests that if respondent would do likewise then petitioner would refrain from filing a Motion for Sanctions as well.

Petitioner will determine her course with respect to a Motion for Sanctions upon hearing whether respondent will answer all non-answered portions of the First and Second Interrogatories to respondent.

Petitioner's Motion for Temporaries

Petitioner seeks temporary maintainance, attorneys fees, suit monies, restraining order and injunction.

1. Areas of Agreement:

The parties agree to an order prohibiting the parties from communicating with each other at their places of

employment. Respondent shall be excluded from the family home and shall not threaten to or actually break into the home.

2. Areas of Disagreement or No Agreement and Reasons Therefor:

The respondent will not pay any temporary attorneys fees or suit monies because he asserts he has his own litigation and appraisal expenses and he alleges petitioner is employed and has a recent inheritance. Petitioner asserts respondent earns approximately twice her earnings, she has recently been unable to work, and she is not so capable given her present obligations, particularly that of a minor son not born of the marriage.

The respondent cannot agree to temporary maintenance beyond his paying one-half of the monthly mortgage payment of approximately \$1,200, which obligation is presently in default. The petitioner seeks respondent to pay this mortgage payment as he has been making it in the past and she has other substantial bills such as medical bills and child care for her minor son. She also requests additional maintenance so that she may maintain the living standard acquired during the marriage.

The respondent has agreed to reconsider his position upon receipt of bills and a list of debts from petitioner and these will be provided.

The parties have also discussed selling marital assets to pay current debts. Petitioner desires to sell the bass boat in respondent's possession. Respondent desires to sell the Blazer in petitioner's possession.

Further Discovery

Respondent desires depositions of petitioner and Mr. C. W. Jones and perhaps others. Petitioner desires depositions of respondent and Mr. Roger Prock and perhaps others.

1. Areas of Agreement:

Petitioner and respondent's depositions will be scheduled on convenient dates subject to the provisos set forth below.

2. Areas of Disagreement or No Agreement and Reasons Therefor:

Petitioner cannot produce Mr. Jones as he is not a party and can be deposed only pursuant to a subpoena personally served upon him.

Respondent asserts that Mr. Jones is and has been represented by a partner of the firm which represents petitioner herein, and that Mr. Jones' previous subpoena was released as a result of negotiations with said partner over a conflict preventing the witness from appearing pursuant to said subpoena.

Petitioner intends to file a protective order prohibiting further discovery by respondent pending depositions of him and perhaps others. Petitioner has located a potentially illegal wire tap in the home and her attorneys have seen and had read to them by respondent's attorneys certain transcripts of petitioner's private telephone conversations with persons other than respondent. These wiretaps may have included eavesdropping upon communications between petitioner and her attorneys. Petitioner would be severely prejudiced in proceeding with

discovery without immediate access to the manner in which these transcripts were obtained and the contents thereof.

Respectfully submitted,
DIETRICH, DAVIS, DICUS,
ROWLANDS,
SCHMITT & GORMAN

By /s/ Edward R. Spalty
Edward R. Spalty #26086
Philip A. Klawuhn #31012
1700 City Center Square
1100 Main Street
Kansas City, Missouri 64105
(816) 221-3420

ATTORNEYS FOR
PETITIONER

Certificate of Hand-Delivery

I hereby certify a copy of the foregoing was hand-delivered this 10th day of December, 1984, to Ms. Rose Anne Nespica, 219 North 7 Highway, Blue Springs, Missouri and to Mr. Michael J. Albano, 311 West Kansas, Independence, Missouri, attorneys for respondent.

/s/ Edward R. Spalty
ATTORNEY FOR PETITIONER

IN THE CIRCUIT COURT OF
JACKSON COUNTY MISSOURI

In Re the Marriage of:)	
JOSEPHINE ANTIONETTE FRICK,)	
)	
Petitioner,	)	Case No.
	)	DR84-1285
vs.)	
JOHN WILLIAM FRICK,)	
)	
Respondent.)	

MOTION FOR PROTECTIVE ORDER

COMES NOW the petitioner, Jo Ann Frick, through her attorneys, and herewith moves for a protective order against a certain Notice to Take Deposition attached hereto as Exhibit A and incorporated herein. This discovery should not be had for the following reasons:

1. Insufficient notice of the time and place of the deposition was given to the petitioner and her attorneys. The Notice, Exhibit A, purports mailing to petitioner's attorneys occurred on February 9, 1985. However, the envelope in which same was enclosed, a copy of which is attached as Exhibit B and incorporated herein, is clearly postmarked February 11, 1985. Said Notice was not received by petitioner's attorneys until February 13, 1985. This is not sufficient notice for a deposition on February 18, 1985.

Even assuming that the Notice was mailed on February 9, 1985, such Notice would nonetheless be insufficient. Missouri Supreme Court Rules 57.03(b) and 44.01(e) require ten days notice, excluding the date of mailing, when a notice to take deposition is served in that manner.

2. Petitioner should be protected from further discovery in this case until at least after certain wiretapped conversations are made available to her and her attorneys. In fact, respondent, through her attorneys, agreed not to undertake further discovery until after recordings of the wiretapped conversations were produced for petitioner. To do otherwise would be oppressive to petitioner and would allow unfair advantage to be taken by respondent from his or his agent's clearly illegal acts.

3. The deposition is noticed for the day when Washington's birthday is to be observed, and is therefore impermissably scheduled on a legal holiday and to allow same to proceed would be oppressive as well.

4. Petitioner's attorney, Edward R. Spalty, has a previous engagement on that day. A business meeting has been scheduled on that date which will involve an out of town participant whose travel schedule cannot be changed.

WHEREFORE, petitioner prays for the Court's protective order providing that the discovery requested in the Notice to Take Deposition on February 18, 1985 not be had.

Respectfully submitted,
DIETRICH, DAVIS, DICUS,
ROWLANDS, SCHMITT
& GORMAN

By /s/ Philip A. Klawuhn
Edward R. Spalty #26086
Philip A. Klawuhn #31012
1700 City Center Square
1100 Main Street
Kansas City, Missouri 64101
(816) 221-3420

ATTORNEYS FOR PETITIONER

Certificate of Mailing

I hereby certify that a copy of the foregoing Motion for Protective Order was mailed via U. S. Mail, postage prepaid, this 14th day of February, 1985, to: Ms. Rose Anne Nespica, 219 North 7 Highway, Blue Springs, Missouri, 64015 and Mr. Michael J. Albano, 311 West Kansas, Independence, Missouri 64050, attorneys for respondent.

/s/ Philip A. Klawuhn
Attorney for Petitioner

Exhibit A

NOTICE TO TAKE DEPOSITIONS

IN RE: The marriage of:

Josephine Antionette Frick,	)	In the Circuit Court
	)	of Jackson County,
Petitioner	)	Missouri at ____
VS.)	
	)	No. DR84-1285
John William Frick,	)	Div. ____
)	
Respondent)	

To the above named Petitioner and Mr. Edward R. Spalty, 1700 City Center Square, 1100 Main, Kansas City, Missouri 64105

YOU ARE HEREBY NOTIFIED, That the depositions of witnesses to be used in evidence on the trial of the above entitled action, in behalf of the Respondent will be taken at the law offices of Paden, Welch, Martin, Albano and Graeff, 311 West Kansas Avenue, in the City

of Independence , County of Jackson , the State
of Missouri , on Monday the 18th day
of February , 19 85, between the hours of 8 o'clock
a.m. and 6 o'clock p.m. and that the taking of the same
will be adjourned from day to day, between the same
hours, until said depositions are completed.

The hour at which the depositions will be taken
is 9:00 A.M.

The deposition of	)	Rose Anne Hespica
Josephine Antionette	)	Michael J. Albano
Frick is to be taken)	
at this time and place.	)	Attorneys for Respondent
Mailed: February 9, 1985)	

Exhibit B

(Front of Envelope containing the following information)

GERALD M. HOLCOMB, Court Reporter
Box 1922
Harry S. Truman Station
Independence, Missouri 64055

RECEIVED
PAK
FEB 13 1984

Mr. Edward R. Spalty
1700 City Center Square
1100 Main
Kansas City, Missouri 64015

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

In Re the Marriage of:)	
JOSEPHINE ANTIONETTE FRICK)	
)	
Petitioner,	)	Case No.
	)	DR84-1285
vs.)	
)	
JOHN WILLIAM FRICK,)	
)	
Respondent.)	

SUGGESTIONS IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER

In support of her Motion For Protective Order from the deposition to be taken from her on February 18, 1985, petitioner states:

It is a fundamental principal of procedural due process that a party to civil litigation receive adequate notice of a deposition. The standard is manifested in Missouri Supreme Court Rule (hereinafter "Rule") 57.03(b). It states a party desiring to take the deposition of another person:

" . . . shall give not less than 7 days' notice in writing to every other party to the action."

Rule 44.01(e) adds three days, excluding the day of service, to the amount of notice required when service, such as was attempted here, is made by mail.

Rule 43.01(d) clearly provides that "Service by mail is complete upon mailing." As shown on the envelope within which the notice to take deposition was contained, mailing occurred on the date of the postmark, February 11, 1985. Mailing on such a date is clearly insufficient to

notify petitioner of a February 18, 1985 deposition since there has not been and cannot be ten days' written notice. The notice was not received until February 13, 1985. Even if it had been mailed February 9, there are still not the requisite ten days' notice.

A motion for protective order may also prevent the discovery from proceeding "to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense". Rule 56.01(c). Respondent's attorneys have indicated they have tapes and transcriptions of telephone conversations between petitioner and persons other than respondent. They have also stated that these were obtained as a result of a wiretap respondent or his agents established on petitioner's telephone line in her home.

Such wiretapping and taping is clearly illegal and the making and dissemination of same is prohibited under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §§2510-2520; *Stamme v. Stamme*, 589 S.W.2d 50 (Mo. App. 1979) (Federal statute making it a criminal offense to willfully intercept any wire or oral communication or to use the contents thereof applies to interspousal wiretaps, and evidence obtained by interspousal wiretaps was not admissible in a dissolution of marriage proceeding). See also, *Kratz v. Kratz*, 477 F. Supp 463 (D. Penn. 1979).

It would clearly be oppressive and unfair to allow respondent to take the petitioner's deposition while respondent has illegally obtained tape recordings of petitioner's telephone conversations, without at least

petitioner first having the opportunity to know the contents of said recordings.

The deposition is noticed for the day upon which Washington's birthday is to be observed and petitioner's appearance cannot be compelled on this legal holiday (Rule 44.01). Additionally, petitioner's attorney, Mr. Edward Spalty, is committed to attend a meeting on February 18 which cannot be changed since an out of town participant cannot change his travel plans.

Respectfully submitted,
DIETRICH, DAVIS, DICUS,
ROWLANDS, SCHMITT
& GORMAN

By /s/ Philip A. Klawuhn
Edward R. Spalty #26086
Philip A. Klawuhn #31012
1700 City Center Square
1100 Main Street
Kansas City, Missouri 64105
(816) 221-3420

ATTORNEYS FOR PETITIONER

Certificate of Mailing

I hereby certify that a copy of the foregoing Suggestions in Support of Motion for Protective Order was mailed via U. S. Mail, postage prepaid, this 14th day February, 1985, to: Ms. Rose Anne Nespica, 219 North 7 Highway, Blue Springs, Missouri, 64015 and Mr. Michael J. Albano, 311 West Kansas, Independence, Missouri 64050, attorneys for respondent.

/s/ Philip A. Klawuhn
Attorney for Petitioner

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

In Re the Marriage of:)	
)	
JOSEPHINE ANTIONETTE FRICK,)	
	)	Case No.
Petitioner,	)	DR84-1285
)	
vs.)	
)	
JOHN WILLIAM FRICK,)	
)	
Respondent.)	

MOTION TO QUASH SUBPOENA AND FOR
PROTECTIVE ORDER FROM DEPOSITION

COMES NOW petitioner, JoAnn Frick, through her attorneys, and herewith moves for the Court's Order quashing the subpoena for deposition to Mr. C. W. Jones, notice of which is attached hereto as Exhibit A, and issuing a protective order providing said discovery not be had. This relief is appropriate for the reasons that:

1. Respondent is in possession of illegally made tape recordings of wiretapped conversations of petitioner with persons other than respondent. Respondent's attorneys have indicated that C. W. Jones was one of the parties whose conversations with the petitioner were intercepted. It would be oppressive to petitioner to require her to proceed without her first having access to these recordings.

Said recordings and transcriptions were requested by petitioner in her First Request for Production of Documents filed and serve on September 7, 1984. These items have not been produced by respondent. Additionally, during a discovery conference ordered by the Court (a

report of which was filed herein on December 10, 1984) counsel for respondent agreed to suspend discovery until after the tapes were made available.

2. The deposition is scheduled for a legal holiday set aside for the observance of Washington's birthday and cannot be held on such a date. In addition, petitioner's attorney, Mr. Edward Spalty, is otherwise engaged for a business meeting which cannot be rescheduled.

WHEREFORE, petitioners prays for the Court's Order providing that the subpoena to take deposition to Mr. C. W. Jones be quashed and for a protective order directing said discovery not be had.

Respectfully submitted,
DIETRICH, DAVIS, DICUS,
ROWLANDS, SCHMITT
& GORMAN

By /s/ Philip A. Klawuhn
Edward R. Spalty #26086
Philip A. Klawuhn #31012
1700 City Center Square
1100 Main Street
Kansas City, Missouri 64105
(816) 221-3420

ATTORNEYS FOR PETITIONER

Certificate of Mailing

I hereby certify that a copy of the foregoing Motion To Quash Subpoena And For Protective Order From Deposition was mailed via U. S. Mail, postage prepaid, this 14th day of February, 1985, to: Ms. Rose Anne Nespica, 219 North 7 Highway, Blue Springs, Missouri,

64015 and Mr. Michael J. Albano, 311 West Kansas, Independence, Missouri 64050, attorneys for respondent.

/s/ Philip A. Klawuhn
Attorney for Petitioner

EXHIBIT A

NOTICE TO TAKE DEPOSITIONS

IN RE: The marriage of:

Josephine Antionette Frick,	)	In the Circuit Court
Petitioner	)	of Jackson County,
	)	Missouri at ____
vs.)	
John William Frick,	)	No. DR84-1285
	)	Div. ____
Respondent)	

To the above named Petitioner and attorney Mr. Edward R. Spalty, 1700 City Center Square, 1100 Main, Kansas City, Missouri 64105

YOU ARE HEREBY NOTIFIED, That the depositions of witnesses to be used in evidence on the trial of the above entitled action, in behalf of the Respondent will be taken at the law offices of Paden, Welch, Martin, Albano and Graeff, 311 West Kansas Avenue, in the City of Independence, County of Jackson the State of Missouri, on Monday the 18th day of February, 1985, between the hours of 8 o'clock a.m. and 6 o'clock p.m. and that the taking of the same will be adjourned from day to day, between the same hours, until said depositions are completed.

The hour at which the depositions will be taken
is 3:00 P.M.

The deposition of	)	Rose Anne Nespica and
Mr. C. W. Jones is to be	)	Michael J. Albano
taken at this time)	
and place.	)	Attorney for Respondent.
Mailed: January 29, 1985)	

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

In Re the Marriage of:)	
JOSEPHINE ANTIONETTE)	
FRICK,)	
)	
	Petitioner,	) Case No.
	)	DR84-1285
vs.)	
)	
JOHN WILLIAM FRICK,)	
)	
	Respondent.)

SUGGESTIONS IN SUPPORT OF PETITIONER'S
MOTION TO QUASH SUBPOENA TO TAKE
DEPOSITION AND FOR PROTECTIVE ORDER

In support of her Motion to Quash the subpoena to take deposition of C. W. Jones on February 18, 1985, petitioner states:

Allowing the deposition to proceed would be highly prejudicial and oppressive to petitioner. The respondent and his attorneys possess recordings and transcriptions of wiretapped communications between petitioner and persons other than respondent. Such wiretapping, conducted by or at the direction of respondent, was done after he moved from the residence and while petitioner harbored a reasonable expectation of privacy in said residence and in the telephone system therein.

Such conduct is clearly illegal and the fruits thereof inadmissible in evidence. *See*, 18 U.S.C.A. §§ 2510-2520; *Stamme v. Stamme*, 589 S.W. 2d 50 (Mo. App. 1979) (Federal Statute making it a criminal offense to willfully intercept any wire or oral communication or to use the contents thereof applies to interspousal wiretaps, and

evidence obtained by interspousal wiretaps was not admissible in a dissolution of marriage proceeding). See also, *Kratz v. Kratz*, 477 F. Supp. 463 (D. Penn. 1979).

The Court, under Missouri Supreme Court Rule 56.01(c), has the authority to prevent discovery from proceeding "to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." Petitioner submits to allow the deposition of C. W. Jones to proceed would be highly oppressive in view of the illegal wiretap. Respondent's attorneys have indicated conversations between Mr. Jones and the petitioner were intercepted.

Counsel for the parties recently met to discuss discovery issues at the request of the Court. Counsel for respondent agreed that it would be appropriate for petitioner to have access to the intercepted material before their discovery proceeded.

Respondent is now and since September 30, 1984, has been under the duty to provide said tapes and transcriptions. Request No. 16 of petitioner's First Request For Production Of Documents filed and served on September 7, 1984, requested:

"Any and all documents or things pertaining to any investigation or surveillance of your spouse herein, including but not limited to investigation reports, correspondence, activity logs, photographs, tape recordings, films or video tapes and any documents or things obtained by or during the course of any such investigation or surveillance."

This request has not yet been met, even though respondent's counsel agreed to do so at the recent discovery conference.

The subpoena to take deposition should be quashed and protective order issued for the additional reasons that it is scheduled on a national holiday, Washington's birthday, Rule 44.01, and attorney Edward Spalty has another engagement which cannot be cancelled.

For the foregoing reasons, petitioner respectfully suggests the Court's order quashing the subpoena to take deposition and providing this discovery not be had.

Respectfully submitted,

DIETRICH, DAVIS, DICUS, ROWLANDS,
SCHMITT & GORMAN

By /s/ Philip A. Klawuhn

EDWARD R. SPALTY #26086

PHILIP A. KLAUHN #31012

1700 City Center Square

1100 Main Street

Kansas City, Missouri 64105

(816) 221-3420

Attorneys for Petitioner

Certificate of Mailing

I hereby certify that a copy of the foregoing Suggestions In Support Of Petitioner's Motion To Quash Subpoena To Take Deposition And For Protective Order was mailed via U.S. Mail, postage prepaid, this 14th day of February, 1985, to: Ms. Rose Anne Nespica, 219 North 7 Highway, Blue Springs, Missouri, 64015 and Mr. Michael J.

App. 50

Albano, 311 West Kansas, Independence, Missouri 64050, attorneys for respondent.

/s/ Philip A. Klawuhn
Attorney for Petitioner

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

In Re the Marriage of:)	
JOSEPHINE ANTIONETTE)	
FRICK,)	
)	
	Petitioner,	) Case No.
	)	DR84-1285
vs.)	
JOHN WILLIAM FRICK,)	
)	
	Respondent.)

MOTION FOR PROTECTIVE ORDER
FROM DEPOSITION

COMES NOW petitioner, JoAnn Frick, through her attorneys, and herewith moves that the Court issue a protective order providing that the deposition noticed for her on March 28, 1985 not be had. This relief is appropriate for the reasons that:

1. Attorneys for respondent are required by the Missouri Supreme Court Rules to give petitioner ten days notice, exclusive of the day of mailing, of her deposition.

The instant notice to take depositions purports to have been mailed on March 18, 1985 but mailing on that date is not sufficient to provide ten days notice of the deposition exclusive of the date of mailing. In any event, it does not even appear that the notice was mailed on March 18, 1985, since the postmark is dated March 19, 1985.

2. Petitioner is informed and believes that respondent or his representatives are in possession of illegally made tape recordings of wiretapped conversations of

petitioner. As stated in petitioner's Motion to Quash Subpoena and For Protective Order From Deposition, filed February 15, 1985, it would be oppressive to petitioner to require her to proceed without her first having access to these recordings.

WHEREFORE, petitioner prays that the Court issue a protective order providing that the deposition of the petitioner noticed for March 28, 1985 not be had.

Respectfully submitted,

DIETRICH, DAVIS, DICUS, ROWLANDS,
SCHMITT & GORMAN

By /s/ Philip A. Klawuhn

EDWARD R. SPALTY #26086

PHILIP A. KLAUHN #31012

1700 City Center Square

1100 Main Street

Kansas City, Missouri 64105

(816) 221-3420

Attorneys for Petitioner

— Certificate of Mailing

I hereby certify that a copy of the foregoing Motion For Protective Order From Deposition was mailed via U.S. Mail, postage prepaid, this 26th day of March, 1985, to: Ms. Rose Anne Nespica, 219 North 7 Highway, Blue Springs, Missouri, 64015 and Mr. Michael J. Albano, 311 West Kansas, Independence, Missouri 64050, attorneys for respondent.

/s/ Philip A. Klawuhn

Attorney for Petitioner

EXHIBIT "A"

NOTICE TO TAKE DEPOSITIONS

Josephine Antionette)	
Frick,)	
	)	In the
Petitioner	)	Circuit Court
	)	of Jackson
VS.	)	County, Missouri
John William Frick,	)	at
	)	No. DR84-1285
Respondent	)	Div. ____
)	
)	

To the above named Petitioner and attorney Mr. Edward R. Spalty, 1700 City Center Square, 1100 Main Street, Kansas City, Missouri 64105

YOU ARE HEREBY NOTIFIED, That the depositions of witnesses to be used in evidence on the trial of the above entitled action, in behalf of the Respondent will be taken at the law offices of Paden, Welch, Martin, Albano and Graeff, 311 West Kansas Avenue in the City of Independence, County of Jackson, the State of Missouri, on Thursday the 28th day of March, 1985, between the hours of 8 o'clock a.m. and 6 o'clock p.m. and that the taking of the same will be adjourned from day to day, between the same hours, until said depositions are completed.

The hour at which the depositions will be taken in
9:30 A.M.

The deposition of)	
Josephine A. Frick is to	)	Mr. Michael Albano
be taken at this time	)	Ms. Rose Anne Nespica
and place.	)	Attorney for Respondent
Mailed: March 18, 1985)	

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

In Re the Marriage of:)	
JOSEPHINE ANTIONETTE)	
FRICK,)	
)	
	Petitioner,	) Case No.
	)	DR84-1285
vs.)	
)	
JOHN WILLIAM FRICK,)	
)	
	Respondent.)

SUGGESTIONS IN SUPPORT OF PETITIONER'S
MOTION FOR PROTECTIVE ORDER

In support of her Motion For Protective Order From
Deposition of petitioner on March 28, 1985, petitioner
states:

Missouri Rule of Civil Procedure 57.03(b)(1) states
that a party desiring to take the deposition of any person
upon oral examination shall not give less than 7 days'
notice in writing to every party to the action. In addition,
Rule 44.01(e) states that when a notice is served upon a
party by mail, three days are added to the proscribed
period. Finally, Rule 44.01(a) states that in computing any
period of time prescribed by these rules, the day of the
act, event or default after which the designated period of
time begins to run is not to be included. Consequently,
attorneys for respondent, by mailing notice on March 19,
1985 of the deposition of petitioner on March 28, 1985,
have failed to provide sufficient notice under the Mis-
souri Rules of Civil Procedure.

As was stated in Suggestions in Support of Petitioner's Motion to Quash Subpoena to Take Deposition and For Protective Order filed on February 15, 1985, allowing this deposition to proceed would be highly prejudicial and oppressive to petitioner. The respondent and his attorneys possess recordings and transcriptions of wiretapped communications between petitioner and persons other than respondent. Such wiretapping, conducted by or at the direction of respondent, was done after he moved from the residence and while petitioner harbored a reasonable expectation of privacy in said residence and in the telephone system therein.

Such conduct is clearly illegal and the fruits thereof inadmissible in evidence. *See*, 18 U.S.C.A. §§ 2510-2520; *Stamme v. Stamme*, 589 S.W. 2d 50 (Mo. App. 1979) (Federal Statute making it a criminal offense to willfully intercept any wire or oral communication or to use the contents thereof applies to interspousal wiretaps, and evidence obtained by interspousal wiretaps was not admissible in a dissolution of marriage proceeding). *See also*, *Kratz v. Kratz*, 477 F. Supp. 463 (D. Penn. 1979).

The Court, under Missouri Supreme Court rule 56.01(c), has the authority to prevent discovery from proceeding "to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense."

These recordings and transcriptions were requested by petitioner in her First Request for Production of Documents filed on September 7, 1984. Also, during a discovery conference ordered by the Court, a report of which was filed on December 10, 1984, counsel for respondent

agreed to suspend discovery until after the tapes were made available. Respondent has not to date produced these items.

Petitioner cannot be certain that the Court overruled its Motion to Quash Subpoena and For Protective Order From Deposition, filed February 15, 1985, based on the rejection of the above-mentioned argument. Petitioner again advances said argument in this Motion in order that she is not interpreted to have abandoned or waived her objection to respondent's refusal to provide the illegally obtained tape recordings prior to the taking of her deposition.

For the foregoing reasons, petitioner respectfully suggests the Court's protective order from the deposition of petitioner noticed for March 28, 1985.

Respectfully submitted,

DIETRICH, DAVIS, DICUS, ROWLANDS,
SCHMITT & GORMAN

By /s/ Philip A. Klawuhn

EDWARD R. SPALTY	#26086
PHILIP A. KLAUHN	#31012
1700 City Center Square	
1100 Main Street	
Kansas City, Missouri 64105	
(816) 221-3420	

Attorneys for Petitioner

Certificate of Mailing

I hereby certify that a copy of the foregoing Suggestions In Support Of Petitioner's Motion For Protective Order was mailed via U.S. Mail, postage prepaid, this 26th day of March, 1985,

to: Ms. Rose Anne Nespica, 219 North 7 Highway, Blue Springs, Missouri, 64015 and Mr. Michael J. Albano, 311 West Kansas, Independence, Missouri 64050, attorneys for respondent.

/s/ Philip A. Klawuhn
Attorney for Petitioner
